Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

JOHN J. KORESKO, V; REGIONAL EMPLOYERS'; ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE; PENN-MONT BENEFIT SERVICES, INC.; AND KORESKO & ASSOCIATES,

Petitioners,

v.

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Gramm-Leach-Bliley Act (GLB), 15 U.S.C. §6810, et seq, the Right to Financial Privacy Act (RFPA), 12 U.S.C. §3401 or the Health Insurance Portability and Accountability Act (HIPAPA) modify ERISA §504 such that the Department of Labor is now required to establish compliance with these statutes and jurisdiction before it can compel disclosure of private financial and identity information?

A. Have *Morton Salt* and *Powell v U.S.* been overruled in part by statute and this Court's jurisprudence concerning the right to privacy?

B. Did this Court's observation in *U.S. v Mead*, that the Administrative Procedure Act requires that an agency prove jurisdiction before acting, implicitly overrule parts of *Morton Salt* and *Powell v. U.S.*?

II. Were the rights to Privacy and Due Process guaranteed by the Constitution of the United States to an attorney and his clients violated when the courts below enforced DOL administrative subpoenas by:

A. refusing to compel the Department of Labor to prove compliance with financial privacy statutes and its own agency regulations and published legal positions;

B. refusing to allow the subpoenaed parties to examine DOL's investigators after Petitioners had introduced evidence of bad faith, in violation of *Powell v. U.S.*;

C. ignoring evidence that the Internal Revenue Service was using the DOL as an agent to procure protected identity information without following "John Doe" summons procedures;

D. issuing contempt citations, imposing extraordinary fines and ordering incarceration of an attorney/record-holder in a matter of first impression?

PARTIES TO THE PROCEEDING

A. Petitioners

Koresko & Associates, P.C. is a Pennsylvania professional corporation engaged in the practice of law. *John J. Koresko, V* is an attorney and Certified Public Accountant; licensed in both professions to practice in the Commonwealth of Pennsylvania. At all times relevant to this case Mr. Koresko was the principal shareholder of Koresko & Associates, P.C.

The *Regional Employees' Assurance Leagues* ("REAL") is an unincorporated, informal association of employers from throughout the United States. REAL does nothing more than act as "sponsor" for a Voluntary Employees' Beneficiary Association trust ("VEBA"), known as REAL VEBA. A VEBA is a statutory welfare benefit arrangement, generally described in 26 USC §501(c)(9) and 419(e). REAL VEBA provides death benefits, funded with insurance policies issued by U.S. insurers.

The Delaware Valley Leagues ("DVL") was an unincorporated, informal association of employers that disbanded prior to 1996 along with its VEBA trust. All employers associated with DVL VEBA , except one, adopted REAL VEBA.

PennMont Benefit Services, Inc, ("PennMont") administers *multiple employer trusts* (METs), including REAL VEBA and the former DVL VEBA.

John J. Koresko, V, Esquire and Koresko and Associates, P.C. (collectively "Koresko") are counsel to the foregoing trusts and PennMont. Mr. Koresko is also attorney in fact to each of the individual plan participants, by virtue of appointment contained in agreements for participation in REAL VEBA.

B. Respondents

Elaine L. Chao is the Secretary of the United States Department of Labor who at all times relevant to this matter acted by and through agents and employees of the United States Department of Labor.

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OPINIONS BELOW

The opinion of the United States District Court by the Honorable Mary McLaughlin is not a reported opinion and is included in the Appendix to this Petition.

The opinion of the United States Court of Appeals for the Third Circuit is not a reported opinion and is included in the Appendix to this Petition.

The Order of the United States Court of Appeals for the Third Circuit denying reconsideration and hearing *en banc* was issued without opinion.

The Order of the United States Court of Appeals for the Third Circuit, denying Petitioner's Petition for a Writ of Mandamus, was issued without opinion.

STATEMENT OF JURISDICTION

The Order denying reconsideration and hearing *en banc* was docketed in the United States Court of Appeals for the Third Circuit on December 20, 2005. A subsequent petition for a Writ of Mandamus was denied on January 20, 2006. These were final decisions from the Court of Appeals. Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV:

Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the Commonwealth of Pennsylvania

Article I – DECLARATION OF RIGHTS

> *That the general, great and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE THAT –*
>
> Section 1. Inherent Rights of Mankind. All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of

acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Gramm-Leach-Bliley Act, 15 U.S.C §6801(a)

...The policy of Congress (is) that each financial institution has an affirmative and continuing obligation to respect the privacy of its consumers and to protect the security and confidentiality of those consumers' nonpublic personal information.

Gramm-Leach-Bliley Act, 15 U.S.C §6802

Notice Requirements

(a) Except as otherwise provided in this subchapter, a financial institution shall not disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with section 6803 of this title.

(b) Opt Out

(1) In general—A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless;

(A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form or other form permitted by the regulations prescribed under section 6804 of this title, that such information may be disclosed to such third party.

(B) the consumer is given the opportunity before the time such information is initially disclosed, to direct that such information not be disclosed to such third party; and

(C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option.

Gramm-Leach-Bliley Act, 15 U.S.C §6802(e) -- Exceptions

(8) to comply with Federal, State or local laws, rules and other applicable legal requirements; to comply with a properly authorized civil, criminal or regulatory investigation or subpoena or summons by Federal, State or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance or other purpose as authorized by law.

Right To Financial Privacy Act, 12 U.S.C. §3402

Access to financial records by Government authorities prohibited; exceptions

Except as provided by section 3403(c) or (d), 3413, or 3414 of this title, no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and-

(1) such customer has authorized such disclosure in accordance with section 3404 of this title;

(2) such financial records are disclosed in response to an administrative subpoena or summons which meets the requirements of section 3405 of this title;

(3) such financial records are disclosed in response to a search warrant which meets the requirements of section 3406 of this title;

(4) such financial records are disclosed in response to a judicial subpoena which meets the requirements of section 3407 of this title; or

(5) such financial records are disclosed in response to a formal written request which meets the requirements of section 3408 of this title.

Right To Financial Privacy Act, 12 U.S.C. §3405

Administrative Subpoena and Summons

A Government authority may obtain financial records under section 3402(2) of this title pursuant to an administrative subpoena or summons otherwise authorized by law only if -

(1) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;

(2) a copy of the subpoena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpoena or summons was served on the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

"Records or information concerning your transactions held by the financial institution named in the attached subpoena or summons are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.) for the following purpose: If you desire that such records or information not be made available, you must:

"1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating

that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

"2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States district courts:

ERISA §504 (pertinent parts) 29 U.S.C. §1101 *et seq*.

The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this subchapter or any regulation thereunder—

(1) to make an investigation and in connection therewith to require the submission of reports, books and records and the filing of data in support of any information required to be filed with the Secretary under this subchapter, and—

(2) to enter such places, inspect such books and records and question such persons as he may deem necessary to enable him to determine the facts relative to such investigation,---

if he has reasonable cause to believe there may exist a violation of this subchapter or any rule or regulation thereunder or if the entry is pursuant to an agreement with the plan.

STATEMENT OF THE CASE

In 2003, the Department of Labor ('DOL') requested information concerning Regional Employers' Assurance League ("REAL") and the Delaware Valley League ("DVL"). Petitioner, John Koresko, V, as counsel to these

unincorporated associations, provided the information to which the DOL was entitled. Thereafter, a DOL Investigator, Ms. George, arrived at the Petitioner's law firm and demanded to view thousands of other documents. As Petitioner was not present and no one on site had access to the information, Ms. George was not permitted to see the documents or further search the premises.

On January 28, 2004 the DOL issued identical subpoenae *duces tecum* to Petitioner, his law firm, Regional Employers Assurance Leagues, Delaware Valley League and PennMont Benefit Services ("PennMont").[1] The subpoenas made broad requests for all bank records and expense records as well as sales marketing advertising and promotional materials. Most importantly and at the heart of this case was the *DOL's subpoena request for the identity of all employers and employee participants in the REAL VEBA and DVL Plans as well as all insurance policies held by the Plans.*[2]

On February 4, 2004, all of these parties submitted their Objections. Petitioners asserted the information requested was outside the investigative authority and jurisdiction of the DOL as the welfare benefit trusts involved are not employee welfare plans described in ERISA §3 (1). As such REAL and DVL as unincorporated associations were not subject to ERISA or DOL jurisdiction. The Objections included attorney-client privilege, specifying the Internal Revenue Ser

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[1] The subpoenas appear on pages 483 thru 558 of the Appendix.

[2] Petitioner uses the word "plans" in a generic sense, not conceding that employee welfare benefit plans contemplated by ERISA §3(1) exist in this case.

vices' intent to litigate matters relating to the files as stated in the IRS Notice 95-34[3].

Petitioner informed the DOL that he and his clients believed that the subpoena was issued for an improper purpose[4] -- that the DOL was providing information to the IRS, which the IRS could not otherwise obtain. Petitioner volunteered to supply any non-privileged information and to provide all other documents, redacted as to names or other identifying information.

In response to the Objections the DOL filed a Petition To Enforce Subpoenas.[5] The DOL stated that it had no information that PennMont, REAL VEBA or DVL had engaged in any improper activity.[6] In response to the enforcement action, Petitioners again raised the questions of privilege, and privacy rights protected by the Gramm-Leach Bliley Act (GLB), (7) the Right to Financial Privacy Act ("RFPA") and

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[3] See Appendix p. 577 thru p. 668, which contains all Objections and references to the IRS matter. The Department of Labor confirmed the IRS issue when at the May 10, 2004 it confirmed its intention to turn over the information to the IRS. The statements appear in the transcript of May 10, 2004 at page 19 and are part of the record of the Third Circuit Court of Appeals case No. 04-3614 at A1385.

[4] Appendix p. 413, Affidavit of John Koresko

[5] Appendix p. 465

[6] Record of Third Circuit Court of Appeals case No. 04-3614 at A1385-Transcript of Hearing of May 10, 2004, page 19.

[7] (Pub. L. 106-102, title V, Sec. 502, Nov. 12, 1999, 113 Stat. 1437.)

Health Insurance Portability and Accountability Act ("HIPAA"). The District Court never addressed the statutory privacy issues, with the exception of excusing turnover of medical information, and rejected any claim of privilege.

Petitioner filed a timely appeal to the United States Court of Appeals for the Third Circuit on September 8, 2004.[8] On December 23, 2004, the Department of Labor filed a renewed motion for adjudication of civil contempt. A Response was timely filed and the matter proceeded to hearing on January 7, 2005. On January 10, 2005 the District Court issued its order which in pertinent part provided that (a) upon a denial of the Motions for Stay then pending in the Circuit Court of Appeals, the Koresko parties were in contempt and must comply with the August 23, 2004 Order; and (b) assessed prospective fines of $250.00 per day for each day there was no compliance.[9]

Petitioners filed a Notice of Appeal of the January 10th contempt order on February 9, 2004. On February 25, 2005 the DOL filed a Motion for Incarceration of John Koresko.[10] The District Court at a hearing on March 16, 2005 took the motion for incarceration under advisement.[11] Judges Becker and Fisher of the Third Circuit granted a stay of proceedings on July 22, 2005.[12] After the grant of stay, the DOL, contrary to the Order, subpoenaed Commerce Bank in order to obtain identity information as to the employer and employee

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[8] Appendix p. 311

[9] Appendix p. 456

[10] Appendix p. 456-7

[11] Appendix p. 458

[12] Appendix p.230

REAL VEBA and/or DVL Plans.[13] The new subpoenae requested information on the personal records of John Koresko and his brother, Lawrence.

The Court of Appeals issued a ***non-precedential*** opinion on October 12, 2005. [14] The opinion did not address GLB, FRPA, HIPAA, ERISA § 504, or the inconsistency of the Secretary's actions with its regulations and public legal positions. On December 20, 2005, the Third Circuit issued its mandate to the District Court. On January 5, 2006 the DOL renewed its motion to incarcerate John Koresko. Mr. Koresko on January 9, 2006 filed a Motion in the Third Circuit Court of Appeals to Recall the Mandate and to Stay the Mandate Pending a Petition for Certiorari. That Motion is still pending and undecided.

Petitioner filed a Petition for Issuance of a Writ of Mandamus on January 19, 2006. In that Petition, Petitioner asked the Third Circuit to compel the District Judge and Secretary of Labor to cease violations of GLB, RFPA, HIPAA and the privacy rights of Petitioner and his clients because of illegitimate enforcement of ERISA § 504. The Circuit Court denied the mandamus petition within hours of its submission.

On January 23, 2006, the District Court held a hearing on the Secretary's Motion to Incarcerate petitioner.[15] The District Court held Petitioner, a lawyer, responsible for the acts of the other Petitioners. On February 23, 2006 the District Court issued a memorandum and order granting the DOL's Motion to incarcerate John Koresko. The Court gave Mr. Koresko until March 10, 2006 to produce the documents and

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[13] Appendix p. 241

[14] Appendix p. 1

[15] Appendix p.21-115 Transcript of heating 1/23/06

avoid incarceration. District Judge McLauglin and the Third Circuit denied motions to stay the February 23 Order. This Order was appealed and that matter is pending. In lieu of being imprisoned, Mr. Koresko surrendered 255,894 documents in electronic form on March 10, 2006, and completed fine payments through that date in excess of $68,000.

REASONS FOR GRANTING WRIT

The gravamen of this case is whether or not the Gramm-Leach-Bliley Act ("GLB"), 15 U.S.C. §6801, et seq., the Right to Financial Privacy Act ("RFPA"), 12 U.S. C. §3401 et seq., and an assumption stated in this Court's decision in *U.S. v Mead Corp.*, 533 U.S. 218 (2001), impose an affirmative duty upon the DOL to establish jurisdiction and compliance with privacy statutes before an attorney [whom DOL asserts is a plan administrator] or any other person must disclose client identifying information. The question of first impression is the modification of ERISA §504 by GLB, RFPA, HIPAA and the common law. However, this case could be resolved solely on clarification of ERISA § 504. The courts below failed to apply the plain language of that statute.

I. ERISA § 504 does not permit enforcement of the subpoena served by DOL in this case

A. ERISA § 504 grants the DOL limited subpoena power

The statutory authority of the DOL under ERISA §504 has been modified by the operation of the financial privacy statutes noted above, thus rendering prior reliance on *U.S. v. Powell*, 379 U.S. 48 (1964), *FTC v. Morton Salt*, 334 U.S. 37, 68 S.Ct. 822 (1948) and subsequent decisions improper (outside the context of IRS subpoena enforcement). ERISA § 504 permits the Secretary of Labor to investigate and obtain, in a pre-litigation setting, only certain information and only under certain circumstances. The Secretary of Labor's

investigation must be "to determine whether any person has violated or is about to violate any provision of ERISA or any regulation thereunder." She may require the "submission of . . . books and records in support of any information required to be filed" under ERISA. Entry into places of business to inspect records and question people is permitted "if she has reasonable cause to believe there may exist a violation" of ERISA "or any rule or regulation thereunder." ERISA § 504 allows the Secretary to distribute any information received to a broad universe of people, including a person who filed a complaint in the matter.

B. DOL knew it had no subpoena authority because it considers REAL VEBA and DOL not to be ERISA plans

A most remarkable aspect of this case is that DOL has advanced a consistent litigation position for 15 years that multiple employer trusts (MET) like REAL VEBA, which are not controlled by employers or employees, are not ERISA plans at all. *See, e.g.* DOL Op. No. 96-25A, 1996 WL 634362, at *3. DOL has pronounced that unless the MET is under the control of the employers/employees, it is not an ERISA plan and accordingly does not fall within the review of certain provisions exercised herein. *Gruber v. Hubbard Bert Karle Weber, Inc.*, 159 F.3d 780, 787 (3d Cir. 1998) (citing DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A. Oct. 31, 1996)); *MDPhysicians & Associates Inc. v. State Board of Insurance*, 957 F.2d 178 (5th Cir. 1992) (*Amicus Curiae* – U.S. Secretary Of Labor); *Taggart Corp., v. Life & Health Benefits Admin. Inc.*, 617 F.2d 1208, 1210 (5th Cir. 1980); *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir.1982); *Finderne Management Company, Inc. v. Barrett*, 355, 809 A.2d 842 (N.J. App. Div. 2002) (*Amicus Curiae* United States Department of Labor). If the arrangement is not an "employee benefit plan" described in ERISA, DOL

has no jurisdiction and no power to employ ERISA § 504 against Petitioner.

Two District Courts had previously determined that neither REAL VEBA nor DVL was an ERISA Plan.[16] Despite two independent District Court opinions, the DOL continued to demand documents that contained private financial and medical information. It became apparent that the Department's agents had no true interest in any investigation about "possible ERISA violations," but sought only the identities of a lawyer's clients. This is precisely the type of conduct GLB, RFPA and HIPAA seek to prevent.

"Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz*, 415 U.S. 199, 235, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974). "This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Id.* If it served DOL's purpose, there is no doubt it would argue that the foregoing statements of position have the force and effect of law. After all...

"the rulings, interpretations and opinions of the [Secretary], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. . . The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements . . ." *U.S. v. Mead Corp.*, 533 U.S. 218, 228, 121 S.Ct. 2164, 2170 150 L.Ed.2d

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[16] SCM, et al. v. Penn-Mont Benefit Services, et al., No. 00-2134 U.S.D.C., N.J., Bassler, J. slip op., at 6.

REAL VEBA, et al. v. SCM, et al., No. 01-4693, U.S.D.C. E.D.Pa., Hutton, J. Slip Op.

292 (2001), quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40, 65 S.Ct. 161, 89 L.Ed. 124 (1944). DOL did not need the names of participants to determine that REAL VEBA and DVL belonged to the non-ERISA classification. It had the plan documents, as they were surrendered early in the proceeding. It knew the structure of the subpoenaed entities when it continued to seek massive fines and imprisonment of Petitioner. DOL pursued contempt proceedings in violation of its own guidance, in bad faith, and as evidence ultimately showed, as an agent of the Internal Revenue Service.

Mead injected another twist into the analysis. Just a few lines before the foregoing quotation, this Court observed that the Administrative Procedure Act governs an agency's actions, and "the agency's exercise of authority. . . assumes that it "is constitutional" and "does not exceed its jurisdiction." *Id.*, citing 5 U.S.C. § 706(2)(B), (C). This Court assumed almost as hornbook law that jurisdiction is a prerequisite to the DOL's subpoena authority; therefore, an *ultra vires* subpoena must be void. The courts below refused to evaluate whether this Court's views expressed in *Mead* were more contemporary, persuasive and accurate standards, even if they conflicted in part with *U.S. v. Powell*, 379 U.S. 48 (1964), *FTC v. Morton Salt*, 334 U.S. 37, 68 S.Ct. 822 (1948) (holding that the agency need not prove jurisdiction at the administrative subpoena stage).

In many circumstances an administrative agency seeking judicial enforcement of its subpoena must examine the relevant records to determine its jurisdiction and coverage of the entity and information sought. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 214 (1946). However, this matter is not the norm because two federal courts already reviewed relevant records and determined that these plans/trusts are not employer/employee controlled. Furthermore, the Respondents/Appellants in the Eastern District

case produced those records to DOL and DOL refused to review them, instead rushing to enforce the administrative subpoenas. DOL knew ERISA could not apply. What they really wanted all along is the identity of a lawyer's clients. DOL failed to advise the District Court that a threshold determination could be made pursuant to the plan and trust documents, and the documents produced by Petitioner.

C. There was nothing for DOL to get pursuant to ERISA § 504 because its regulations excused the REAL VEBA death benefit plans from making any report.

The plain language of ERISA § 504 specifically limits what DOL can obtain in a pre-litigation setting – information that would have been reportable to the Secretary. The subpoenae issued in this case reflected no such limitation, instead requesting virtually everything held by Petitioner.

ERISA §103 contains a general requirement that an ERISA-covered plan[17] make an annual report. Pension and welfare benefit plans generally are required to file an annual return/report, the Form 5500 Series, regarding their financial condition, investments, and operations, unless exempted by ERISA or regulations promulgated thereunder. The annual reporting requirement is generally satisfied by filing either the Form 5500 or 5500-C/R and any required attachments. (29 USC §1023). The DOL and Internal Revenue Service jointly developed the Form 5500 and Form 5500-C/R so employee benefit plans could utilize the Form 5500 Series to satisfy annual reporting requirements under Title I and Title IV of ERISA and under the Internal Revenue Code. *United States v Coyle*, 63 F.3d 1239 (3rd Cir. 2002). Nowhere on a

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[17] In *Yates*, this court examined the elements of a plan covered by ERISA.

Form 5500 is there any requirement for providing individual names. Moreover, Petitioner with respect to its relationship with Penn-Mont and REAL VEBA, is expressly exempted from filing annual reports with the DOL for REAL VEBA or the benefit arrangements thereunder. 29 CFR §§ 2520.104-21 (limited exemption for certain group insurance arrangements); 2520.104-20 (limited exemption for certain small welfare plans); 2520.104-43 (exemption from annual reporting requirement for certain group insurance arrangements).

There is no information reportable to the Secretary. ERISA §504 gives DOL no pre-litigation subpoena authority in this situation, and it certainly gives the DOL no authority to obtain client identity information that is not reportable. DOL's enforcement activities were blatant bad faith actions designed to misuse the statute and damage Petitioner and his clients. These questions were side-stepped by the District Court and the Third Circuit Court of Appeals and Petitioner suffered substantial harm.

D. HIPAA eliminated DOL's ability to disclose all information connected to its investigation under ERISA § 504

ERISA § 504 clearly violates the Health Insurance Portability and Accountability Act of 1996 (August 21), Public Law 104-191, as implemented in 45 CFR Parts 160 – 164 ("HIPAA"). Section 504 allows the Secretary to turn over any information it receives to others, including the complainant. The Secretary has subpoenaed insurance contracts and plan records that have sensitive medical information. HIPAA was enacted specifically to limit the dissemination of medical information. ERISA §504 is no longer consistent with HIPAA and other privacy protections erected by Congress

II. The Financial Privacy Laws have modified the Department of Labor's Investigative Authority under ERISA §504

A. The Gramm Leach Bliley Act demands good faith and jurisdiction, neither of which were shown below.

GLB, which was effective November 1999, provides that jurisdiction be established before personal financial information is disclosed. In expressing its intent Congress stated:

> "...the policy of Congress [is] that each financial institution has an affirmative and continuing obligation to respect the privacy of its consumers and to protect the security and confidentiality of those 'consumers' nonpublic personal information." 15 U.S.C. §6801(a)

Most importantly GLB is very clear as to what requirements are imposed upon a financial institution and on the government agency.

Notice requirements

> (a) Except as otherwise provided in this subchapter, a financial institution shall not disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with section 6803 of this title.
>
> (b) Opt out
>
> (1) In general -- A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless -

> (A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form or other form permitted by the regulations prescribed under section 6804 of this title, that such information may be disclosed to such third party;
>
> (B) the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and
>
> (C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option. (15 U.S.C. §6802)

Section 6803(4) defines "nonpublic personal information" as "personally identifiable financial information (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or ***(iii) otherwise obtained by the financial institution***. Consumers have the right under the Act to prevent disclosure of personal financial information. 15 U. S. C. sec. 6802(b)(1)(B) (Emphasis added).

GLB at Section 6802(e) provides exceptions to the prohibition on disclosure. Only one is implicated here:

> (8) to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a *properly authorized* civil, criminal, or *regulatory investigation or subpoena* or summons by Federal, State, or local authorities; or *to respond to* judicial process or *government regulatory authorities having jurisdiction* over the financial institution for examination, compliance, or other purposes as authorized by law. (Emphasis added.)

The exception at paragraph 8 cannot apply. Whether the subpoena is "properly authorized" is the core of this case. "Properly authorized" contemplates that ERISA § 504 allows the Secretary to obtain the information.

Clearly, the DOL is a government regulatory authority, but the Department does not have jurisdiction for examination of the records of REAL VEBA or the other parties. The DOL certainly did not prove its jurisdiction below. By the express terms of the Act, Petitioner is entitled to refuse disclosure unless and until it is proven that the exceptions of the Act apply to the DOL.

In this case there has been no showing by the DOL that it or financial institutions gave notice to anyone. More importantly, potentially affected consumers through their attorney in fact, Mr. Koresko, commanded that there be no disclosure.[18] Accordingly, Petitioner and other financial institutions involved in this case [and whom the DOL subpoenaed] are under a very clear statutory mandate not to disclose any nonpublic consumer financial or identifying information. DOL was not entitled to the identities of Mr. Koresko's clients.

GLB clearly expresses Congressional intention that fishing expeditions masquerading as investigations are no longer legal. The Act expressly impacts prior case law. In this case and others, DOL relied on *U.S. v Morton Salt Co.*, 338 U.S. 632, 94 L.Ed. 401 (1950) and *U.S. v. Powell*, supra. These cases did not require proof of jurisdiction before a district court enforces an administrative subpoena. The DOL could, under the guise of ERISA §504, apparently rip apart virtually anyone's business, get confidential information, disclose it

[18] Appendix p. 233-241 p.412-418

without limitation, and simply apologize if it did not have jurisdiction.

Two things must be said about this precedent. First, *Morton Salt* and *Powell* are decades old, predating this Court's jurisprudence on privacy rights. Subsequent statutory law has worn away the main thread of the holdings – that government inquiries must be presumed legitimate. Secondly, *Powell* was a tax case, not a DOL case. The Internal Revenue Service has jurisdiction over every citizen of the United States, whereas the DOL does not. No reported decisions have distinguished *Powell* in this fashion, although the distinction is crucial in settings not involving tax investigations. *Powell* demands detailed declarations from IRS agents before summonses can be enforced, yet DOL asserts that merely stating a conclusion of law, "we need the documents to complete our investigation," should be enough reason to sacrifice a citizen's right to be left alone. This Court's announcement of limitations on the *Morton Salt* and *Powell* holdings would not violate rules for abandoning *stare decisis*. *See Planned Parenthood of Southeastern Penna., et al. v. Casey*, 505 U.S. 833 (1992). ("The rule of *stare decisis* is not an "inexorable command," and certainly it is not such in every constitutional case, *see Burnet v. Coronado Oil Gas Co.*, 285 U.S. 393, 405-411 (1932) (Brandeis, J., dissenting)"). In *Casey*, this court articulated a series of practical tests to determine when it is time to depart from precedent:

> (1) whether the old rule defies practical workability,
>
> (2) whether there has been so much reliance on the rule that special hardship would result and add inequity to the cost of repudiation,
>
> (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or

> (4) whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification,

Casey, at 854.

The case before the court today satisfies all these tests. The holding of *Morton Salt* can no longer be blindly applied in the age of sophisticated business and expensive litigation. Some courts, like the Seventh Circuit and Ninth Circuit have already modified *Morton Salt.* The courts below chose blinders.

The holding of *U.S. v Powell* must be clarified so as to distinguish summonses issued in tax cases from those issued by the DOL. The Internal Revenue Service has jurisdiction over every American, but the DOL does not.

B. The RFPA demands good faith and notice, neither of which were shown below.

In the case below, the Secretary and the Courts failed to respect the Right To Financial Privacy Act (RFPA) 12 U.S.C.§3401 which GLB relies upon and is, in fact, a companion law. The RFPA prohibits any agency or department from obtaining from any financial institution (as defined by the RFPA) a customer's private financial information without prior consent. There are exceptions to the prior consent provisions that include administrative subpoenas. This, however, is an exception that is subject to specific limitations.

Under 12 U.S.C. §3405 a government authority may obtain financial records protected by RFPA pursuant to administrative subpoena only if (1) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry and (2) a copy of the subpoena has been served upon the customer or mailed to his last known address on or

before the date the subpoena was served upon the financial institution together with a notice stating with specificity the nature of the law enforcement inquiry.

RFPA and GLB must be construed *in pari materia* with ERISA §504.[19] Thus, there exists a statutorily prescribed ju-

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[19] The inquiry begins with the language of the statute, *see Ardestani v. INS*, 502 U.S. 129, 135, 112 S.Ct. 515, 116 L.Ed.2d 496 (1991), which "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). "The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." *Ardestani*, 502 U.S. at 135-36, 112 S.Ct. 515 (citation omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)). In the absence of that rare and exceptional circumstance, "we are bound to take Congress at its word." *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 118 S.Ct. 838, 841, 139 L.Ed.2d 849 (1998). *Borman v. Raymark Indus., Inc.*, 946 F.2d 1031, 1035 (3d Cir.1991) ("It is an 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'") (quoting *Colautti v Franklin*, 439 U.S. 379, 392, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979)). (internal quotations omitted).

Nowhere does ERISA §504 state that a subpoena can be issued without first proving jurisdiction and authority of an agency in a particular matter. Neither GLB's nor the Privacy Act's addition of a prerequisite proof of jurisdiction conflicts with the investigative authority granted to the DOL. The statutes taken together make clear, however, that the Department cannot violate the privacy of anyone it wants to bother.

jurisdictional requirement for the DOL. A financial institution is strictly and clearly prohibited from releasing private financial records until the requirements under §3405 are satisfied. 12 U.S.C. §3403 (b). There is no basis to exempt the DOL.

These privacy statutes impose no undue hardship upon the DOL, as its own internal operating policies showed the lack of jurisdiction. More disturbingly, the Secretary served a subpoena on petitioner's own bank, Commerce Bank, N.A., to obtain petitioner's private financial data. There is no basis for invasion of petitioner's financial privacy by the Secretary.

C. The ability of DOL to investigate is not compromised by complying with privacy laws, but the scope of investigation must reflect developments of the law.

The construction of GLB advanced herein does not make ERISA §504 useless as a tool for investigation. ERISA §504 was enacted in 1974, before the Privacy Act, 12 U.S.C. §3401 et seq., took effect, and 25 years before GLB. Section 504 of ERISA pre-dates the recognition of the right to privacy. *See Whalen v. Roe*, 429 U.S. 589 (1977) (the constitutional right to privacy protects two types of privacy interests: (1) the individual interest in avoiding disclosure of personal matters, and (2) the interest in independence in making certain important decisions). The Constitution obviously supersedes even those statutes enacted in good faith. Congress often corrects prior errors in policy. In GLB, Congress changed the requirement for pre-enforcement proof of jurisdiction. An agency now has to prove its jurisdiction before burdening citizens with the huge expense of subpoena compliance. The Seventh Circuit expressed this common sense position 11 years ago without relying on GLB. *Reich v Great Lakes Indian Fish and Wild Life Commission*, 4 F.3d

490 (7th Cir. 1993).[20] Consequently, this case illuminates a split in Circuit authority about the application of *Morton Salt* and *Powell* in DOL matters, regardless of the privacy statutes.

The question of the effect of subsequently enacted privacy laws upon the investigative power granted to DOL under ERISA §504 is one of first impression. It requires this Court's analysis and determination to insure consistent application of the law and protection of the citizens of this country.

III. Petitioner's Privacy Rights Were Violated

The DOL's actions implicate the common law of privacy that developed since the enactment of ERISA § 504 in 1974. Any action of a federal agency that violates legitimate expectations of privacy as a result of arbitrary and capricious actions by lower level governmental employees violates the protections of the Fourth and Fourteenth Amendment's. *See Schieber v. City of Philadelphia*, 320 F.3d 409, 417 (3d Cir. 2003) quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). ("'the touchstone of due process is protection of the individual against arbitrary action of the government.' " *Id.* at 845, 118 S.Ct. 1708). The DOL had no right to subject the records of other people

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[20] The question of regulatory jurisdiction is properly addressed at the subpoena enforcement stage. *Reich v Great Lakes Indian Fish and Wild Life Commission*, supra. As noted by Judge Posner of the Seventh Circuit Court of Appeals "compliance with a subpoena is a burden and one that a person or institution can show is not subject to the regulatory regime in aid of which the subpoena was issued should not be required to bear."

to unrestricted invasion as an instrument of revenge for challenge to their subpoena power.[21]

The powers the DOL seeks to exercise against the petitioners and its clients are incompatible with the concepts of ordered liberty enunciated by the Third Circuit and this Court. *See Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 110 (3d Cir. 1987) ("[i]t would be incompatible with the concept of privacy and ordered liberty to permit protected medical, financial and behavioral information . . . to be publicly disclosed." *Id.* at 118. Section 504 of ERISA and its failure to include any procedural safeguards against disclosure or malfeasant use of confidential tax and financial information cannot stand up to modern constitutional scrutiny. See: *Scheetz v. Morning Call Inc.*, 946 F.2d 202 (3d Cir. 1991) (financial records within the zone of privacy); *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000) (collecting cases affirming right to privacy).

The conduct of the DOL shows little regard for privacy rights. Of particular note is the continuation of the investigation after stay was granted by the Circuit Court. Also telling is the refusal to accept redacted documents and a clear statement of intent to disclose the information to the IRS that the IRS could not legitimately obtain. [22]

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[21] See Appendix p. 413 Affidavit of John Koresko. Based on the DOL's admission in Court of its intent to turn the material over to the IRS and that there was no belief that PennMont, REAL VEBA or DVL had violated ERISA or other law Petitioner has a good faith belief that the "investigation" may have an improper purpose.

[22] In *United States v Leibman*, 742 F3d 807 (3rd Cir, 1984) IRS not permitted to compel disclosure of identity of attorney's clients as it violated privilege.

IV. Petitioners' Due Process Rights were violated by the enforcement activities and refusal of the District Court to allow Petitioner to prove DOL's bad faith.

A. The severe fines crossed the line from civil to criminal contempt without any prior notice to Petitioner

Since the District Court's first contempt order, Petitioner paid over $68,000.00 in fines. The severity of the sanctions takes this matter out of the realm of civil contempt and has positioned it as something else: criminal sanctions and unlawful taking of liberty and property.

Petitioner does not dispute that the District Court has the inherent power to act to compel compliance with its legitimate orders. This Court believes that a Federal court's wide discretion as to whether to invoke its inherent powers should be tempered by its rather limited discretion as to how it exercises them, and therefore careful, case-specific consideration is owed not only to the character of the sanctionable conduct, but also to the nature and purpose of the sanction. Generally, the harshest of sanctions based on inherent powers have been upheld only in situations involving bad faith, contumacy, or egregious misconduct. *Chambers v NASCO*, 501 U.S. 45-46, 111 S. Ct. 2123. It cannot be said that a lawyer who adheres to his oath in a matter of first impression, demonstrates bad faith or misconduct when a court refuses to decide an ultimate issue and the lawyer discovers evidence of an agency's illegal intent.

Petitioner submits that the sanctions here have gone far beyond a Court's legitimate exercise of inherent power. The excessive, punitive sanctions are criminal in nature and Petitioner has been denied constitutional protections. See: *Hicks v Feiock*, 485 U.S. 624, 108 S. Ct. 1423 (1988).

B. The District Court violated Petitioner's Fifth Amendment right to due process by denying him the right to take evidence from DOL

Petitioner has suffered loss of rights and property in the absence of meaningful due process. After all, Judge McLaughlin refused twice to allow Petitioner the opportunity to examine DOL agents after the judge received affidavits of DOL misconduct. The imposition of sanctions and a contempt citation, where there is an absence of jurisdiction, is wholly inappropriate. But the District Court's intentional deviation from the command of *Powell*, that bad faith of a government agency excuses compliance with a subpoena and an affected party is entitled to prove it after bringing forth evidence, marks the District Court's punishments of Petitioner with the stain of constitutional infirmity.

This case illustrates a split in the Circuits as to how a subpoenaed party demonstrates the existence of the government's bad faith, thus obviating an investigatory administrative subpoena under the fourth *Powell* factor. Justice Breyer, when on the First Circuit bench, held that some evidence, more than mere allegation, is sufficient to trigger a right to cross-examine the government. *United States v. Church Of Scientology Of Boston*, Inc., 933 F.2d 1074 (1st Cir. 1991). The Ninth Circuit agrees. *U. S. v. Church of Scientology of California*, 520 F.2d 818 (9th Cir. 1975) ("district court should have granted the Church a limited evidentiary hearing to inquire into the Service's purposes"). In this case, however, the courts below had evidence, affidavits, and witnesses willing to demonstrate the DOL's bad faith. Yet Petitioner was fined and almost incarcerated because he was not permitted to examine the declarant who prompted a vicious assault on the liberty of a lawyer and his clients. Although the Third Circuit talks about *Powell* as binding precedent,

one cannot question a government employee about his bad faith, so a citizen has virtually no chance of impeaching the veracity of a government declarant. This case also highlights the problems that occur when a district court will not place limitations on the use of subpoenaed information, noted in detail in *Church Of Scientology Of Cal. v. United States*, 506 U.S. 9 (1992) (noting "disarray" of federal court decisions and this Court's deadlock in *United States v. Zolin*, 491 U.S. 554 (1989))

Petitioner has suffered loss of rights and property in the absence of meaningful due process. There is no indication in the record that petitioner has acted contumaciously or in bad faith. The $68,000 plus paid by Petitioner and imminent incarceration has crossed the line from civil into a criminal penalty and thus deprived him of property without due process.

The DOL's bad faith is apparent. Whether or not bad faith guides the DOL's acts, the pursuit of subpoena enforcement has deprived petitioner of significant property and gave him the Hobson's choice of incarceration or consent to illegality. Moreover, by moving forward against a lawyer on flimsy premises, the lawyer's clients get the joy of hearing the DOL associate the lawyer's name with the word "investigation." This Court cannot divorce itself from human nature and how the reputation of any lawyer suffers when the Government seeks to bother clients. A lawyer only has two assets: his intellect and his reputation. Deprive a lawyer of either, and there is no longer a lawyer – only a man with a degree and a license. In Pennsylvania, since the dawn of this Nation, reputation is as entitled to constitutional protection as any

property, whether or not a man practices law.[23] There was press coverage of these events and the damage to Attorney Koresko is now public and complete. Koresko's constitutional right to his reputation has been denied without due process.

The DOL invaded a law office, worked for the IRS, obtained confidential information, and deprived a lawyer of money and his good name without ever having to establish jurisdiction. Moreover, DOL conveniently disregarded its own twenty-year-old position that the arrangements named in the subpoena are not ERISA Plans and cannot be subject to a DOL investigation. The subpoena process has been void *ab initio*. The failure of the DOL to establish its jurisdiction and investigative reach and the District Court's failure to require any preliminary showing of the same before the imposition of severe sanctions, and the Circuit Court's failure to order compliance with the law, violates any concept of fundamental due process owed to Petitioner or his clients

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[23]. Article I Constitution of the Commonwealth of Pennsylvania

CONCLUSION

For all of the forgoing reasons, Petitioners respectfully request that this Honorable Court issue a writ of certiorari to the Third Circuit Court of Appeals, summarily reverse the actions of the court below, and/or grant any and all appropriate relief consistent with the issuance of the writ.

Respectfully submitted,

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